

D.P.U. 87-DS-148

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40,
by Amorello and Sons, Inc.

APPEARANCES: John Amorello, Treasurer
Amorello and Sons
115 Southwest Cut-Off
Worcester, MA 01613
FOR: AMORELLO AND SONS, INC.
Respondent

Robert Smallcomb, Engineer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On November 25, 1987, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Amorello & Sons ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on September 30, 1987 on Plantation Street, Worcester in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground pipe operated by Massachusetts Electric Company ("Massachusetts Electric" or "Company").

On January 11, 1988, an informal hearing was held at the Department. At that hearing, the Respondent stated that it had a valid Dig-Safe number, and that the damage to the underground facilities was caused by the inappropriately shallow depth of those facilities. In a letter dated March 7, 1988, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law, and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the damage occurred before the 72-hour notice for Companies to mark their underground facilities, that the teeth marks from the Respondent's equipment indicated that the Respondent had contacted the facility below a reasonable cover point, and that the Division had no jurisdiction over the depth of electrical facilities.

On March 11, 1988, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on July 6, 1988 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

Robert F. Smallcomb, a public utility engineer for the Department, represented the Division. John Amorello, Treasurer for Amorello & Sons, Inc., represented and testified for the Respondent.

II. SUMMARY OF FACTS

A. The Division's Position

At the hearing, Mr. Smallcomb introduced an underground damage report from the Company (Exh. D-1). In that report, it was alleged that the Respondent had broken a pipe and cable belonging to Massachusetts Electric and that proper notice was not given to the Company (id.). Mr. Smallcomb stated that the Respondent started excavating at the site approximately 48-hours after it notified Dig-Safe, in violation of the 72-hour notice required by the Dig-Safe Law (Tr. at 6).

Mr. Smallcomb acknowledged that the Company's underground damage report showed that the facility was located at a depth of 19 inches when the damage occurred (id. at 7-8; Exh. D-1). He stated that the Company normally locates its facilities at a depth of 30 inches below finished grade (Tr. at 7-8). However, he maintained that the depth of the facility was irrelevant because the finished grade had not been established when the damage occurred and the construction was ongoing (id. at 8).

Mr. Smallcomb alleged that the damage was caused by the Respondent's lack of precautions during excavation (id. at 12, 18). He stated that the facility was damaged with a Khoering excavation machine while the Respondent was installing sewer and water connections at an apartment complex (id. at 5; Exh. D-1). He contended that the Respondent should not have used "heavy" excavating equipment to locate the Company's underground facilities (Tr. at 19). He

further contended that the damage could have been avoided had the Respondent excavated by hand and used more precautions while excavating (id. at 13, 22). Finally, Mr. Smallcomb alleged that the Respondent acted with negligence, which resulted in damage to the Company's underground facility (id. at 3-4).

B. The Respondent's Position

The Respondent offered a list of the Dig-Safe numbers that it had obtained for the excavation on Plantation Street (Tr. at 15; Exh. A-1). On this list, the Respondent showed three separate Dig-Safe numbers corresponding to 285 Plantation Street for different types of excavation which were obtained on the dates of September 5, and October 6, 1986, and July 15, 1987 (Exh. A-1).

Mr. Amorello testified that on September 28, 1987, when the Respondent again notified Dig-Safe, the supervisor from Dig-Safe assured the Respondent that a second Dig-Safe number was unnecessary because the construction was ongoing (Tr. at 9-10, 15). Mr. Amorello testified that the excavation on Plantation Street was continuous, and that the Respondent had not left the site (id. at 4, 10). Mr. Amorello further testified that the Respondent chose to obtain a new number for additional safety, and that the area had been marked by the Company (id. at 4, 10).

Mr. Amorello testified that the damage to the Company's facility was caused by an error on the part of the operator of the Khoering excavating machine (id. at 9). He further testified that the operator was properly licensed, and an employee of the Respondent (id. at 21). In addition, he contended that the damage probably occurred because the Company's facility was buried at a shallow depth, and that the operator of the Khoering had expected to find the facility at a deeper

location (id. at 10, 13, 21). Mr. Amorello further stated that the Respondent could not control its operators and also should not be held accountable for every break of an underground facility by its operators (id. at 12, 23).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall, except in an emergency, ... make an excavation ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but no more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation

The statute requires the excavator to give initial notice before the proposed excavation begins. The only exception is when the excavator leaves the construction site for a significant period of time, when it must notify Dig-Safe again before resuming. Ramey Construction Company D.P.U. 86-DS-133 (1987). The Department has found that where an excavator maintains a continuous presence at a work site, additional Dig-Safe notifications are not required unless the original markings are obliterated. Id.

The statute also states:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way ... including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to

expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

In cases where large machinery may be used for excavation, excavators should take possible factors such as grade changes due to weather into account before estimating the actual location of marked facilities and excavated with large excavating equipment. Amorello & Sons D.P.U. 89-DS-61, at 4-5 (1990) (certain external factors might cause Company markings to be slightly inaccurate). The Department has also held that excavators must take external factors into account when initially searching for underground facilities. Id. Further, in situations where markings are clear, it is the excavator's responsibility to be cognizant of the risks involved in excavating and adopt an excavating method that is reasonable given the circumstances. Mahoney, supra.

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. See Fiore & Zenone, D.P.U. 88-DS-10 (1993); Fed. Corp. supra, at 5-6. In addition, the mere fact that a utility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the

Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

However, the Department has found that where there is material evidence to support an inference of a lack of reasonable care, failure on the part of the excavator to provide evidence to negate that allegation will lead to a finding that the excavator violated the Dig-Safe Law.

Northern Foundations *supra*, at 4.

III. ANALYSIS AND FINDINGS

The two issues to be decided in this case are: (1) whether the Respondent failed to properly notify Dig-Safe before the damage occurred on September 30, 1987; and (2) whether the Respondent failed to take adequate precautions to prevent damage while excavating at 285 Plantation Street.

In addressing the first issue, the Respondent provided uncontroverted evidence which showed that the Respondent did not leave the excavation site for a significant period of time and that the excavation was ongoing. The Respondent also provided evidence which showed that it had obtained several new Dig-Safe numbers for the site in question over a period of approximately one year. Mr. Amorello testified that the Respondent requested a new Dig-Safe number and marking for the area for additional safety. No evidence was presented that indicated the existence of new underground facilities or other changes at the site in question over the year-long time period of excavation. Finally, no evidence was presented showing that the facilities which had been previously marked were not still marked. Accordingly, for these reasons, the

Department finds that Respondent did not violate the Dig-Safe Law by failing to meet its 72-hour notice requirement.¹

In addressing the second issue, the Division alleged that the Respondent failed to take adequate precautions to prevent damage while excavating. The Division contended that hand-digging should have been used to locate the Company's facility and would have prevented damage to that facility. The Division also presented evidence which showed that the damaged facility was buried at a depth of only 19 inches, shorter than the normal business standard of 30 inches below finished grade.

Although damage to facilities located at shallow depths is not prima facie evidence that precautions could not be taken during excavation, because there are no statutory requirements as to proper depths for underground utilities, Fed. Corp., supra at 5, depth may be a factor in determining whether an excavator's options for taking precautions were limited. See New England Excavating, Inc., D.P.U. 89-DS-116 at 7 (1993). Here, the Respondent did not show that exposing the facility by hand-digging was impossible, and therefore, that the Respondent's options for taking precautions were not limited despite the depth of the facility.

Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes failure to exercise reasonable precautions. See Cairns & Sons, Inc., supra; Petricca Construction Company, supra; John Mahoney Construction Co., supra; Northern Foundations, Inc., supra. Therefore, because the Respondent failed to hand-

¹ Pursuant to the Dig-Safe Law, if company markings are lost or obliterated, excavators can request a remarking by contacting the company or Dig-Safe. The company is then required to remark the requested site within 24 hours of the notification.

dig before using heavy machinery to excavate, thereby causing damage to an underground facility, the Department finds that the Respondent failed to take reasonable precautions to protect the facilities at 285 Plantation Street, in Worcester, in violation of the Dig-Safe Law.

IV. ORDER

Accordingly, after due notice, hearing and consideration, the Department

FINDS: That Amorello & Sons, Incorporated, violated the Dig-Safe Law when its crew failed to take reasonable precautions to prevent damage to an underground facility at 285 Plantation Street, in Worcester, Massachusetts, and it is

ORDERED: That Amorello & Sons, Incorporated, being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,